No. 83-1065

In The

Supreme Court of the United States

October Term, 1983

THE COUNTY OF ONEIDA, NEW YORK AND THE COUNTY OF MADISON, NEW YORK,

Petitioners,

vs.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, A/K/A The Oneida Nation of New York, A/K/A The Oneida Indians of New York; THE ONEIDA INDIAN NATION OF WISCONSIN, A/K/A The Oneida Tribe of Indians of Wisconsin, Inc.; and THE ONEIDA OF THE THAMES BAND COUNCIL,

Respondents.

BRIEF OF ONEIDA INDIAN NATION OF WISCONSIN AND ONEIDA INDIAN NATION OF NEW YORK IN OPPOSITION TO PETITIONS FOR CERTIORARI

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28 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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COUNTER-STATEMENT OF THE CASE

To correct petitioners' misstatements and omissions, the Oneida Indian Nation of Wisconsin and the Oneida Indian Nation of New York (hereinafter referred to jointly as the Oneida tribes) make this counter-statement of the case.

This suit was filed in 1970 by the Oneida Indian Nations of New York and Wisconsin, later joined by the Oneida of the Thames Band, claiming ownership of 871.92 acres of real property. No private property owners are involved in the litigation. The Oneida tribes sued only two counties in upstate New York which, in turn, filed third

party complaints against New York State. The Oneida tribes sought an award of trespass damages for the two years preceding the commencement of the action. Eviction was not sought.

From time immemorial until 1795, the Oneida Nation occupied the real property that is the subject of the suit. The subject property, part of the Oneida Nation's aboriginal territory, was secured to it by federal treaties in appreciation for the invaluable assistance given the United States by the Oneida Nation during the Revolutionary War. Treaty of Fort Stanwix, October 22, 1784, 7 Stat. 15; Treaty of Fort Harmar, January 9, 1789, 7 Stat. 33. A smaller part of Oneida territory, including the subject land, was recognized as Oneida property by the United States in a third treaty. Treaty of Canandaigua, November 11, 1794, 7 Stat. 44.

To fulfill its treaty obligations to Indian tribes and to better enforce its pre-emptive constitutional authority in the area, the United States Congress enacted the Indian Trade and Intercourse Act in 1790. The statute declared void any land transactions with an Indian tribe not concluded by public treaty under authority of the United States. 1 Stat. 137-38, section four, Act of July 22, 1790.[1] Despite the plain language of the federal treaty and statutory provisions, the State of New York purported to pur-

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[1]The 1790 statute was subsequently re-enacted without major change. *See* 1 Stat. 329, 330-31, section 8, Act of March 1, 1793; 1 Stat. 469, 472, section 12, Act of May 19, 1796; 1 Stat. 743, 746, section 12, Act of March 3, 1799; 2 Stat. 139, 143, section 12, Act of March 30, 1802. In 1834, the protection of individual Indian lands was deleted from the statute. 4 Stat. 729, 730-31, section 12, Act of June 30, 1834; Rev. Stat., section 2116; now 25 U.S.C. section 177.

chase approximately 100,000 acres of Oneida territory in 1795. The transaction was concluded not only without federal authority or approval, but also over the strong objection of the federal Indian superintendent. 434 F. Supp. 527, 534-35.

In their 1970 complaint, the Oneida tribal plaintiffs challenged the 1795 transaction on the bases of the protective provisions of federal treaties and the Indian Trade and Intercourse Act and seek damages against Oneida and Madison Counties as successors in interest to New York State. The district court dismissed the complaint for lack of federal question jurisdiction and in a split decision the Second Circuit Court of Appeals affirmed. 464 F.2d 916 (2d Cir. 1972, Judge Lumbard dissenting). This Court granted certiorari and reversed in a unanimous decision. 414 U.S. 661 (1974).

On remand, the counties filed third party complaints against New York State, seeking indemnity for any damages that might be awarded against them. The district court divided the case into three separate proceedings: the first on the counties' liability to the Oneida tribes, the second on the amount of damages if any owed by the counties to the Oneida tribes, and the third on the counties' claim for indemnity from New York State.

At the first proceeding on primary liability, only the Oneida tribes submitted evidence. The counties offered no evidence. Although the counties claimed defenses which raised mixed legal and factual issues, *e.g.* subsequent ratification of the transaction, abandonment, and time re-

lated bars, they chose not to supplement the Oneida tribes' factual submissions.[2] In 1977, the district court issued its decision on primary liability and held that the Oneida tribes had established a violation of the Indian Trade and Intercourse Act and rejected the counties' defenses:

> Unless the act is to be rendered nugatory, it must be concluded that the plaintiffs' right of occupancy and possession to the land in question was not alienated. By the deed of 1795, the State acquired no rights against the plaintiffs; consequently, its successors, the defendant counties, are in no better position.

434 F. Supp. at 548.[3]

At the second hearing on damages, the district court heard evidence from the Oneida tribes and the counties of the fair rental value of the subject land for the years 1968 and 1969. The court allowed the counties an offset for alleged good faith occupancy of the land and awarded the Oneida tribes $16,694.00, plus interest, in total trespass damages.

The remaining issue—the counties' third party indemnity claim against the State—was determined on motions to dismiss and for summary judgment. The counties urged that equity required an implied federal common law right

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[2]The counties asserted other defenses as well, such as bona fide purchaser for value, indispensability of the United States and New York State, and the Oneidas' failure to plead essential elements of a state law cause of action. Those defenses were rejected by the district court, as were the counties' other claimed defenses, and were abandoned by the counties on appeal.

[3]Because the district court found in the Oneida tribes' favor on their statutory claim, it did not reach the treaty claim. 434 F. Supp. at 537 n.19. That claim, which petitioners overlook, remains unadjudicated.

to full indemnity from the State be recognized. The Oneida tribes supported the counties' claim for indemnity. The district court granted the counties' motion for summary judgment and held the State liable to indemnify them for the full amount of the Oneida tribes' judgment against the counties.

All parties appealed portions of the district court's final judgment. The Oneida tribes appealed from the district court's ruling on the amount of trespass damages owed them. Specifically, the Oneidas argued that the counties were not entitled to an offset for improvements erected on the land. The counties challenged the district court's recognition of a right of action in the Oneida tribes under the Indian Trade and Intercourse Act and its holding respecting the counties' claimed ratification and time related defenses.[4] The counties did not appeal the finding that the subject land was part of Oneida aboriginal territory or that the 1795 transaction violated the Indian Trade

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[4]The counties did not appeal from the district court's ruling on their abandonment defense. Neither is that issue explicitly identified as one presented for review on certiorari. Nonetheless, the counties incorrectly assert in their petition that the Oneida tribes acquiesced in the counties' occupancy of Oneida land and have slept on their rights for 175 years. Counties' Petition for Certiorari, pp. 9, 15. For that reason, the district court's unequivocal contrary finding on that point is noteworthy: "The Oneida Indians never abandoned their claim to their aboriginal homeland. The small area of land they now occupy lies within the boundaries of the aboriginal land. Furthermore, they never acquiesced in the loss of their land, but have continued to protest its diminishment up until today." 434 F. Supp. at 541.

and Intercourse Act.[5] The State did not deny the counties' underlying liability to the Oneidas on appeal, but challenged only its obligation to indemnify the counties.

With one major exception, the Second Circuit Court of Appeals affirmed the district court's judgment. 719 F.2d 525. Finding that the counties had not proffered evidence of their claimed good faith occupancy of the land for the two years in question, the court of appeals remanded the good faith issue to the district court for clarification.[6] No petition for rehearing or rehearing *en banc* was filed. The State and counties moved to stay the remand pending the filing of their petitions for certiorari and their motions were granted. As a result, the counties' claimed good faith is as yet undetermined. The State and counties filed timely petitions for certiorari to this Court.

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[5]Although the counties do not state the issue as one presented for review on certiorari, the counties suggest in their petition that the "present Indian respondents" may not have standing to pursue this claim. *See* Counties' Petition for Certiorari, p. 15. Again, that suggestion misrepresents the record in this case. The district court found the Oneida tribal plaintiffs to be the direct political successors of the Oneida Nation. 434 F. Supp. at 532-33. The counties abandoned that issue on appeal and therefore, cannot support their petition for certiorari by invoking the issue now.

[6]The court of appeals modified the district court's judgment in one minor respect. The Oneida tribes appealed the district court's ruling that trespass damages for those lands used by the counties as highways should be assessed at 90% of the property's fair rental value. The court of appeals directed that the damages be recomputed on remand to reflect full fair rental value. 719 F.2d at 542.

REASONS FOR DENYING THE WRITS

The decision of the Second Circuit in this case is well grounded in decisions of this Court on all issues challenged by petitioners. There are no conflicts on any point with other circuit courts or state courts. Indeed, all lower courts to consider the issues have reached the same conclusions as the Second Circuit here. In addition, the practical consequences which petitioners fear have not and cannot happen in this case. This case, which was correctly decided by the Second Circuit, involves ownership of 871.92 acres and two years trespass damages and will not have wide ranging disruptive consequences. Moreover, Congress has been and is actively involved in reaching settlements of tribal land claims, a process that is aided by the rulings in this and other cases. Nothing in the lower court's legal conclusions or its practical implications justifies review by this Court.

I. The issues of law raised by the petitions for certiorari were resolved by the Second Circuit consistently with decisions of this Court, are not novel, and are not the subject of differences among the federal circuit courts or the federal and state courts.

In the decision below, the Second Circuit Court of Appeals construed the Indian Trade and Intercourse Act to have precisely the effect stated in the statute's literal language. Because the State of New York acted without authority of the United States in 1795, the court of appeals held that the purported purchase of Oneida land had no validity in law and equity. *See* 1 Stat. 329, 330.[7]

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[7]The relevant sentence of the 1793 statute read: "That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution."

As a result, New York State did not acquire Oneida title and could not convey title to Oneida and Madison Counties. This and the trespass damages owed ultimately by New York State are but the customary legal incidents flowing from a void land transfer. 719 F.2d at 537.

In every respect challenged by the petitioners, the Second Circuit's decision on primary liability is supported by long-standing precedent of this Court involving familiar principles of law. Moreover, no federal or state court has reached a contrary conclusion on these or similar issues. The Second Circuit's disposition of each issue is correct and unremarkable.[8]

A. Implied statutory and federal common law right of action.

Significantly, petitioners do not dispute the lower court's holding that the 1795 transaction violated the Indian Trade and Intercourse Act. Neither do petitioners deny that the United States, acting as the Oneida tribes' trustee, could have obtained the same result reached below. Petitioners seek review only on the narrow ground that the Oneida tribes cannot accomplish directly what the United States could do on their behalf. Two observations most clearly reveal the existence of federal common law and statutory rights of action in the Oneida tribes themselves.

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[8]The county petitioners suggest that the tribal plaintiffs' consistent success in these cases calls for review by this Court. Counties' Petition for Certiorari, pp. 13-14. That suggestion is, of course, contrary to the usual rule that conflicting results, not consistent ones, are the proper subjects of this Court's discretionary review. S.Ct. Rule 17.

First and foremost, the decision below is wholly consistent with this Court's earlier decision in this case. After their claim had been dismissed for lack of federal question jurisdiction, the Oneida tribes sought review of whether their cause of action arose under federal laws and treaties. Petition for Certiorari at 2, *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974). In its unanimous decision, the Court held that the Oneida tribes had for purposes of federal jurisdiction stated a substantial claim under federal law:

> Here, the Oneidas assert a present right to possession based in part on their aboriginal right to occupancy which was not terminable except by act of the United States. Their claim is also asserted to arise from treaties guaranteeing their possessory right until terminated by the United States, and "it is to these treaties [that] we must look to ascertain the nature of these [Indian] rights and the extent of them." (Citation omitted.) Finally, the complaint asserts a claim under the Nonintercourse Act which put in statutory form what was or came to be the accepted rule that extinguishment of Indian title required the consent of the United States. To us, it is sufficiently clear that the controversy stated in the complaint arises under the federal law within the meaning of the jurisdictional statutes and our decided cases.

414 U.S. 677-78. Given this Court's earlier examination of the nature of the Oneida tribes' cause of action, a second look is not warranted.

Second, the court of appeals undertook a thorough analysis of the issues and faithfully applied this Court's decisions. Respecting the federal common law right of action, the court of appeals observed that this Court has repeatedly emphasized the enforceability of the Indian tribes' federally protected property rights. *See United*

States v. Santa Fe Pacific R.R. Co., 314 U.S. 339 (1941); *United States v. Candelaria*, 271 U.S. 432 (1926); *Fellows v. Blacksmith*, 60 U.S. 366 (1857); *Marsh v. Brooks*, 49 U.S. (8 How.) 223 (1850). This Court has also declared that such rights can be sued upon directly by the Indians themselves. *Creek Nation v. United States*, 318 U.S. 629, 640 (1943); *Bunch v. Cole*, 263 U.S. 250 (1923).

Addressing the implied statutory right of action, the court of appeals found that the special protective purpose of the Indian Trade and Intercourse Act was beyond dispute. 719 F.2d at 532. The available legislative history of the act further supported the existence of an implied right of action in the tribes. In fact, President George Washington, who was a moving force behind the 1790 and 1793 Indian Trade and Intercourse Acts, explicitly so stated. Referring to the act in a speech made to the Seneca Tribe and communicated to Congress, President Washington said in December of 1790,

> "any treaty formed and held without [the federal government's] authority [is] not binding . . . [i]f . . . you have any just cause of complaint against and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons."

American State Papers, I Indian Affairs 139 (1834), *quoted at* 719 F.2d at 539 n.15. Applying the standard of *Cort v. Ash*, 422 U.S. 66 (1975), as refined by a number of recent decisions of this Court, the lower court held that Congress intended that the tribal beneficiaries of the act have a right of action to enforce its provisions. 719 F.2d at 532-37.

The court of appeals had the benefit of clear guidance from this Court on the existence of a federal common law

right and an implied statutory right of action in favor of the Oneida tribes. The standard to be applied in determining this question is well established and has been revisited frequently by this Court in recent terms. Petitioners identify no point of significant departure in the court of appeals' analysis from this Court's decisions.[9] Therefore, this Court need not speak again to those issues in this case.

B. Statutes of limitation and abatement.

The petitioners' statute of limitations and abatement defenses are foreclosed by decisions of this Court. State law defenses have uniformly been rejected where they would operate to validate an otherwise ineffective transfer

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[9]The State petitioner does assert two particulars where, in its view, the court of appeals departed from established law. The State is palpably incorrect on both. First, the State argues that an Indian tribe possesses only those federal rights, including rights of action, that Congress expressly bestows on it. State Petition for Certiorari, p. 7. The correct rule is precisely the reverse. Where recognized tribal property rights are at issue, the tribe retains all its interests unless expressly abrogated by Congress. United States v. Santa Fe Pacific Railroad, 314 U.S. at 339. Thus, Congress need not have explicitly granted a right of action in the Indian Trade and Intercourse Act. Second, the State maintains that the court of appeals failed to recognize that the preemptive effect of federal statutes is greater where the prior cause of action arose under federal common law rather than state law. State Petition for Certiorari, pp. 12-15; *see also* 719 F.2d at 546 (Judge Meskill dissenting. Again, the State urges the wrong rule. Indian statutes are to be "construed generously in order to comport with . . . traditional notions of soveignty and with the federal policy of encouraging tribal independence." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980). In both particulars the lower court correctly applied this Court's decisions.

of restricted Indian land. *See Bunch v. Cole,* 263 U.S. 250, involving a state statute which would create a tenancy-at-will where a lease of Indian land was void; *Ewert v. Bluejacket,* 259 U.S. 129 (1922), where laches was asserted as a defense to an invalid transfer of restricted land. The Court reasoned in *Ewert v. Bluejacket* that the asserted defense "cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." *Id.* at 138. On its face, the rationale precludes the assertion of state statutes of limitations as well and has been consistently so read by lower federal courts.[10] *See Oneida Indian Nation of New York v. New York,* 691 F.2d 1070, 1083-84 (2nd Cir. 1982); *United States v. Ahtanum Irrigation District,* 236 F.2d 321, 324 (9th Cir. 1956), *cert. denied* 352 U.S. 988; *United States v. 7,405.3 Acres of Land,* 97 F.2d 417 (4th Cir. 1938); *Schaghticoke Tribe of Indians v. Kent School Corp.,* 423 F. Supp. 780 (D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.,* 418 F. Supp. 798 (D. R.I. 1976).

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[10]The county petitioners mislead the Court in arguing the inapplicability of the federal statute of limitations here. *See* 28 U.S.C. sec. 2415. The counties state that the United States declined to prosecute these claims for the Oneida tribes inasmuch as "the existence of the claim before the Indian Claims Commission made any further government action unnecessary." Counties' Petition for Certiorari, p. 20. The record in this case reveals nothing on that point. In fact, the United States declined to prosecute this case because the Oneidas' claim against the government before the I.C.C. gave rise to a conflict of interest on the government's part, not because the I.C.C. proceeding provided the exclusive remedy as the county petitioners suggest. That proceeding has subsequently been dismissed.

Similarly, prior decisions of this Court, including that cited by the county petitioners, show the abatement issue to be settled against petitioners. The general rule is that a statutory cause of action is abated only if the statute giving rise to the action is repealed or expires. In *Norris v. Crocker,* 54 U.S. 429 (1850), the statute in question had been repealed and the cause of action based on it abated. *See* Counties' Petition for Certiorari, p. 20. However, where a statute is re-enacted in substantially the same form, actions under the original statute do not abate. *Bear Lake & R. Waterworks Irrigation Co. v. Garland,* 164 U.S. 1, 12-14 (1896); *Pacific M.S.S. Co. v. Joliffe,* 69 U.S. 450, 458 (1865). The pertinent provision of the Indian Trade and Intercourse Act, of course, was re-enacted by the Congress, not repealed or allowed to simply expire. *See* note 1 *above.* Neither the statute of limitations nor the abatement issue is meritorious.

C. Subsequent ratification.

Based on its analysis of the evidentiary record, the Second Circuit concluded that the county petitioners had failed to prove explicit or implied ratification of the 1795 transaction. The court of appeals observed that two later, federally approved transactions referred to "the last purchase" from the Oneida Nation in a metes and bounds description. From extrinsic evidence the Second Circuit found that "the last purchase" meant the 1795 transaction, but the later transactions did not specifically refer to the

1795 transaction by date or recognizable name or otherwise suggest that the transaction was valid. 719 F.2d at 539.[11]

The evidentiary record showing that indirect reference only does not prove an implied ratification. Even if that were the standard of federal approval required by the Indian Trade and Intercourse Act—a point neither the Second Circuit nor the Oneida tribes conceded—the county petitioners offered no evidence that the later federal treaty commissioners or Congress knew which was "the last purchase" or that the "last purchase" had been concluded in violation of the Indian Trade and Intercourse Act. Due to the failure of proof, the Second Circuit found that the 1795 transaction had not been ratified either explicitly or by implication. Such factual conclusions are not appropriate subjects for certiorari.

D. Justiciability.

The political question doctrine is "essentially a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 217 (1962). It reserves for the executive and legislative branches of government those matters which are textually committed to them by the Constitution or are not susceptible to judicial resolution. *Id.* Petitioners invoke the political question doctrine as a bar to the

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[11]In their effort to persuade this Court that the issue is worthy of review, the county petitioners overstate the court of appeals' holding on implied ratification. According to the county petitioners, the Second Circuit "conceded that the first two subsequent treaties between the Oneida Nation and the State of New York, both of which were federally approved, made specific reference to the 1795 transaction." Counties' Petition for Certiorari, p. 20. As is clear from the above, the Second Circuit conceded no such thing.

Oneida tribes' claim but have not identified any constitutional provision that commits the Oneidas' claim to the executive or legislative branch. As a claim based on a federal treaty and statute (414 U.S. at 677-78), the Oneida tribes' claim does not implicate any "question decided, or to be decided by a political branch of government coequal with this Court." *Baker v. Carr, above,* 369 U.S. at 226. Moreover, the courts below have established, and the petitioners do not dispute, that "clearly definable criteria . . . [are] available" to decide the Oneida tribes' claim. *Id.* at 214. Under such circumstances, "the political question barrier falls away." *Id.*[12]

Petitioners invite the Court to undertake an unprecedented expansion of the political question doctrine. In petitioner's view the doctrine should embrace any case with political overtones as that term is ordinarily understood. To expand the political question doctrine in that manner would dictate that federal courts review only politically noncontroversial federal statutory or constitutional claims. That proposition is on its face offensive to Article III of the Constitution in its entirety and has never been

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[12]Lacking any authority from this Court, petitioners suggest that Chief Judge Urbom held claims of this character to be nonjusticable in United States v. Consolidated Wounded Knee Cases, 389 F. Supp. 235 (D. Neb. S.D. 1975). See Counties' Petition for Certiorari, p. 23. In fact, Judge Urbom held only that determining the relationship between tribes and the United States is a nonjudicial function. Noting the judicial duty to expound and enforce the law, he stated that "a judge must hold government to the standards of the nation's conscience once declared, but he cannot create the conscience or declare the standards." Here, the conscience and standards of the nation have been clearly set forth in the Indian Trade and Intercourse Act and the Treaty of Canandaigua. Holding the petitioners to the statutory standards, the courts below did not breach any aspect of the political question doctrine.

accepted by this Court. The petitioners' invitation to expand the scope of the political question doctrine should be declined.

None of the legal issues relating to the primary liability merit this Court's review. Prior decisions of this Court either speak directly to or clearly lay out the framework for analyzing each issue and the lower court carefully applied those precedents with predictable results.

II. The lower court's disposition of the indemnity claim against New York State was correct and equitable.

The supremacy of federal law in Indian affairs precludes any interference by private parties or states, including the thirteen states which claim the right of preemption to Indian land. 414 U.S. at 670. But, as this Court observed, "There has been recurring between federal and [New York] state law; state authorities have not easily accepted the notion that federal law and courts must be deemed the controlling considerations in dealing with Indians." *Id.* It was New York State's particular and knowing violation of the federal Indian Trade and Intercourse Act in 1795 that gave rise to this entire controversy.

Of course, the Oneida tribes sued the counties directly as successors to New York State. Federal law also supports an action by the counties against the State as the original wrongdoer. The absence of an explicit statutory action for indemnity is unimportant. This Court has already noted the role of federal common law in this case by declaring that "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." 414 U.S. at 674; *see also Northwest Airlines v. Transport Workers,* 451 U.S. 77 (1981). The dual remedies fashioned by the federal courts here are balanced and equitable. Full force was given the Oneida tribes' admitted property rights and the monetary costs of that remedy were placed at the feet of the original wrongdoer. A more just result is unimaginable.[13]

The State petitioner, however, insists that its Eleventh Amendment immunity shields it from suit by the counties. But the State ignores the principle that Eleventh Amendment immunity can be abrogated by Congress acting pursuant to authority delegated to it by the states under the Constitution. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 451-456 (1976); *Edelman v. Jordan,* 415 U.S. 651, 672 (1974). Nothing in this Court's recent decision in *Pennhurst State School and Hospital v. Halderman,* — U.S. — (1984) 52

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[13]The justness of holding states accountable for violations of the Indian Trade and Intercourse Act has been acknowledged by the Congress and the President. Each of the legislative resolutions to a tribal land claim enacted thus far includes a substantial state contribution to the costs of settlement. See p. 21 *below*. In addition, President Reagan recently vetoed a legislative settlement in part because the state contributed too little to the settlement. In his veto message on the Western Pequot settlement, President Reagan remarked, that "the Administration has urged that an affected state should pay for at least one-half of settlement costs in claims such as this, which are not against the Federal Government but against the State and private parties who would be the primary beneficiaries of any settlement." Veto Message of S. 366, April 5, 1983, reprinted in June 1983 U.S. Code Congressional and Administrative News, D 71, 98th Cong., 1st Sess. When that settlement was renegotiated and the state involved increased its contribution, the settlement was passed by Congress and signed by the President. See P.L. 98-134, Oct. 18, 1983.

U.S. L.W. 4155 announces a departure from that principle.[14] The court of appeals held here that the Indian Trade and Intercourse Act abrogated the State's immunity on the subjects covered by the act and that New York consented to that abrogation by participating in an activity proscribed by Congress. 719 F.2d at 544, *citing Edelman v. Jordan, above,* 415 U.S. at 672. The State's petition seeking review on Eleventh Amendment grounds requests the Court to reestablish immunity for states in circumstances where jurisprudential and equity considerations have lifted such immunity.

III. Sound considerations of judicial policy counsel that the petitions for certiorari be denied.

Petitioners seek review of the decision below for reason of claimed high stakes in this litigation. The county petitioners argue that private landowners face eviction, that thousands of individuals and businesses are placed in financial peril, that the entire economy of the northeastern United States is in jeopardy. Counties' Petition for Certiorari, pp. 9-13. The State petitioner calculates for the Court the millions of dollars in trespass damages for which it would ultimately be liable were the Oneida tribes to sue and recover for all the years they have been dispossessed. State of New York Petition for Certiorari, p. 6. None of these statements is descriptive of this case.

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[14]It is significant that the New York officials who purported to purchase Oneida land in 1795 had "no colorable basis for the exercise of authority." Pennhurst State School and Hospital v. Halderman, *above,* at note 11. These officials having acted *ultra vires,* the Eleventh Amendment does not protect the State from suit.

The record in this case does not show that any economic disruption has taken place and, with much less imagination than that employed by petitioners, one can conjecture that it will not occur at all. Private parties are not before the Court in this litigation. Eviction will not inevitably ensue from the lower court's decision without further litigation. The Oneida tribes have not sued for one hundred eighty-six years of trespass damages. This suit involves only title to 871.92 acres claimed by two counties and $16,694.00 in trespass damages owed by New York State, nothing more.

In litigation such as that hypothesized by petitioners, the legal relevance of factors like the nature of relief sought or the number of defendants sued would no doubt be a matter of great disagreement between the parties. Presumably, the district court and court of appeals would take those factors into account, if relevant, in determining the merits of the suit or formulating appropriate relief.[15] In that event, this Court would have the benefit of a full factual record on and the lower courts' analysis of such factors. It has neither here and should refrain from considering those factors in the abstract.

Furthermore, review by this Court of the issues identified by petitioners will not resolve this and other tribal land claims or eliminate the possibility of economic dis-

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[15]The petitioners' concerns regarding the social and economic impacts of tribal land claims have been heeded by the district court and the court of appeals where appropriate. In another case where the stakes are, indeed, large, both courts have noted that, to do justice between the parties, the formulation of relief would be informed by equitable considerations. *See, e.g.,* Oneida Indian Nation of New York v. State of New York, 520 F. Supp. 1278, 1295-97 (N.D.N.Y. 1981), *aff'd on this issue* 691 F.2d 1070, 1081 (2nd Cir. 1982).

ruption in other claim areas. Were a court to hold that the tribal plaintiffs have no federal cause of action to enforce tribal property rights, the potential for litigation of these claims would not be foreclosed. The United States, acting as the tribes' trustee, could sue at any time to recover tribal lands. Actions by the United States to recover possession of tribal lands are expressly excepted from the statute of limitations governing tribal trespass claims. *See* 28 U.S.C. section 2415(c). The United States has on occasion actually prosecuted such claims (*see United States v. Boylan,* 265 F. 165 (2nd Cir. 1920)) and could perhaps be compelled by an Indian tribe to do so again. *See Joint Tribal Council of Passamaquoddy Tribe v. Morton,* 528 F.2d 370 (1st Cir. 1975). Individual tribal members could also raise the title issue as a defense in a trespass action filed against them. *See United States v. Dann,* 706 F.2d 919 (9th Cir. 1983). The ruling petitioners seek from this Court, therefore, will not dispel whatever cloud on their title may be posed by the tribes' claim.

Petitioners belittle the process of settling tribal land claims. Yet, it is clear that these claims can best be finally resolved through an equitable settlement implemented by an act of Congress. In consultation with the parties, the Congress can better weigh and make a fair adjustment of competing equities than a court of law. Due to the restraint on alienation appearing in the Indian Trade and Intercourse Act, the Congress must approve any compromise reached by the parties to make the settlement fully binding and effective.

Substantial progress has in fact been made toward resolving tribal land claims through federal legislation embodying a fair compromise. The county petitioners note

that the Narragansett claim in Rhode Island was settled in 1978 and the Passamaquoddy and Penobscot claims in Maine were settled in 1980. Counties' Petition for Certiorari, p. 14. In addition, the Western Pequot claim in Connecticut has been settled. P.L. 98-134, Act of October 18, 1983. The parties in *Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head,* No. 74-5826-MCN (D. Mass.), recently signed a settlement agreement which they expect will soon be ratified by state and federal legislation. Also with a view toward settling the tribe's land claim, the parties in *Cayuga Indian Nation of New York v. Cuomo,* Nos. 80-CV-930, 80-CV-960 (N.D.N.Y.), have been engaged in intense negotiations and the Tunica-Biloxi Tribe is negotiating with the United States and Louisiana.

The legal rulings made in this and other suits have played a constructive role in the legislative settlements. For many years tribal land claims had generally been viewed by the Congress and those who illegally occupy tribal lands as not serious.[16] When the federal courts began to recognize the tribes' ability to enforce directly their property rights in the late 1970's, that perception changed. The Congress and other interested parties at long last came to appreciate the desirability of resolving the claims through

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[16]Like most tribal plaintiffs in similar suits, the Oneida tribes had for generations sought an out of court solution before filing suit. 719 F.2d at 529. When circumstances convinced the Oneida tribes that litigation was necessary, they formulated the suit in such a way as to establish certain legal principles and yet avoid economic disruption in the claim area. The district court repeatedly commented on the Oneida tribes' restraint throughout these proceedings., *See, e.g.,* 434 F. Supp. at 531; Transcript of Decision of Court Dictated from Bench on October 5, 1981, appearing at County Petitioners' Supplemental Appendix to Writ of Certiorari, 65a, 69a.

a fair settlement implemented by federal legislation. The legislative history of each resulting settlement attributes the perceived credibility of the claim and the need for legislative action to this and other litigation. *See* House Rep. No. 95-1453, pp. 7-9, 95th Cong., 2nd Sess., *reprinted at* 1978 *U.S. Code Congressional and Administrative News,* p. 1948, on the Narragansett settlement; House Rep. No. 96-1353, pp. 12-13, 96th Cong., 2nd Sess., *reprinted at* 1980 *U.S. Code Congressional and Administrative News*, p. 3786, on the Maine Indians' settlement; Senate Rep. No. 98-222, pp. 7-8, 98th Cong., 1st Sess., on the Western Pequot settlement.

Petitioners cannot lightly gainsay the familiar relation between the availability of judicial redress and settlement of claims. As has been observed, "the existence of the courts as a last-ditch place of resort contributes to the good ordering of society by encouraging the utilization of less formal or unofficial methods of settlement. . . . Far more disputes are settled because the courts are there to settle them if the parties don't than the courts are actually called upon to settle themselves." H.M. Hart and A.M. Sacks, *The Legal Process,* p. 367 (tent. ed. 1958). The Oneida tribes acknowledge that nexus and have, in fact, proposed to the United States, New York State and the private defendants that a negotiating team be established to discuss settlement of the Oneida claims. It is hoped that that process will produce a just and final resolution of the Oneida claims.

The circumstances here counsel restraint on the Court's part. The legal issues raised by petitioners are not new to this Court and are on their face insubstantial. The practical concerns expressed by petitioners would be more ap-

propriately addressed to the Congress. In short, no purpose in law or policy would be served by this Court's review of the Second Circuit's decision.

For these reasons, the petitions for certiorari should be denied.

Respectfully submitted,

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